Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

Nos. 94-631, 94-797, 94-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, in his official capacity as Governor, State of Georgia, *et al.*,
Appellants,

versus

DAVIDA JOHNSON, *et al.*,
Appellees,

and

UNITED STATES OF AMERICA AND LUCIOUS ABRAMS, JR., *et al.*,
Appellant-Intervenors.

On Appeal from a Three Judge Panel of the United States District Court for the Southern District of Georgia

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

I. Whether the District Court's finding of a racial gerrymander is reviewed under the clearly erroneous standard?

II. Whether the decision below presents any substantive departure from the holding of *Shaw v. Reno* which defined the constitutional limits the Fourteenth Amendment places on race based reapportionment legislation?

III. Whether Georgia's admission that racial gerrymandering occurred as a direct consequence of the Justice Department's demand Georgia maximize black voting strength without due regard for traditional districting principles mandates summary affirmance of the decision below?

IV. Whether the absence of any legal obligation under the Voting Rights Act to maximize black voting strength in derogation of Georgia's traditional districting principles pretermits any contention that a compelling interest was furthered by this race based district?

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for the Southern District of Georgia**

MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees move this Court to affirm the Order and judgment of the three judge panel in this matter. Affirmance is appropriate in light of the State's own candid acknowledgement that it was forced to enact a black vote maximization plan, concocted by the American Civil Liberties Union and imposed on Georgia by the Department of Justice which employed racial gerrymandering as its *modus operandi.*

The issues upon which this case turns are fact intensive. The District Court correctly concluded that the Eleventh

District's shape was highly irregular—bizarre in the parlance of these cases—due to racial gerrymandering. The facts on which this pivotal finding is based are exhaustively cataloged in the majority opinion. Given the deference due those findings by this Court, affirmance is warranted without further argument under *Fed. R. Civ. P.* 52(a).

STATEMENT OF THE CASE

With the completion of the 1990 census, states were obligated to reapportion their Congressional districts to bring them into conformity with the one man-one vote ruling of *Reynolds v. Sims,* 377 U.S. 555 (1964). Prior to the 1990 census, Georgia had ten (10) districts. Its increased population entitled it to one additional seat. (J.S. App. 5)

Since the 1980 census, there had been a quantum leap in the technology of computer software available to assist states in the reapportionment process. Racial data for each census block (100 or less people) became the building blocks employed to fashion districts with a racial rather than geographical focus. (J.S. App. 12, n.6)

This case is ultimately between the State of Georgia and the plaintiff citizens and voters of Georgia who objected to the State's decision to racially gerrymander the boundaries of the Eleventh District. And the State does not dispute any of the salient facts presented by Plaintiffs which the District Court found to be true in connection with the enactment of the reapportionment plan. *Miller, et al.* Jurisdictional Statement [hereinafter *Miller* J.S.] at p. 2. Those facts include the following:

(1) The District Court found Georgia was forced to engage in racial gerrymandering by the Department of Justice [hereinafter referred to as the DOJ] to maximize the Black population in the Eleventh District. Georgia is

a state still under the jurisdiction of the DOJ for purposes of reapportionment. The race based legislation the State adopted was the DOJ's *quid pro quo* for preclearance under Section 5 of the Voting Rights Act [hereinafter, the VRA]. (J.S. App. 26-27) It resulted in a district that was unprecedented in Georgia's history in terms of its shape. The plan surgically segregated every major population center south of Atlanta in order to maximize the inclusion of Blacks and exclusion of whites within the two new majority minority districts the DOJ required the State create.

(2) "The amount of evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming and practically stipulated to by the parties involved." (J.S. App. 42-43). In its jurisdictional statement, the State embraces the District Court's description of the process by which the Eleventh District was created as "a search for [minority voting] maximization by the crudest means, the pursuit of 'maximization of the black vote, whatever the cost', and the like." (*Miller* J.S., p. 3 quoting from the Opinion at App. 27, 11-12, n.4 28).

(3) During the 1990 reapportionment process, the DOJ, in concert with the ACLU, pursued a policy of minority vote maximization throughout the South. (J.S. App. 11). Majority minority districts called "Max-Black" plans were created by the ACLU, ostensibly for their clients, then state legislators Cynthia McKinney and Sanford Bishop. Both were subsequently elected to Congress to represent the very Max-Black districts they worked with the ACLU and DOJ to create. (J.S. App. 13 n.7).

(4) There was no evidence of any intent to discriminate against minorities uncovered at any time during the reapportionment process. (J.S. App. 13). Regardless of that fact, the DOJ adopted the ACLU's Max-Black racial population quotas as the benchmarks for the three majority minority districts the DOJ required Georgia to

create. Those percentages could not be attained without resort to gerrymandering. As stated by the District Court:

> ". . . [T]he slow convergence of size and shape between the Max-Black plan and the plan the DOJ finally precleared, bespeak a direct link between the Max-Black plan formulated by the ACLU and the preclearance requirements imposed by the DOJ." (J.S. App. 26).

(5) The DOJ summarily rejected the first two plans passed by Georgia's legislature. (J.S. App. 13). In the second rejection letter, the DOJ "suggested" the shape the Eleventh District needed to take to meet the 65% black population quota the ACLU had convinced the DOJ was "possible" for the Eleventh even without the Black population in Macon which was needed for the other new Black Max district the DOJ wanted to create. The only way to do that, according to the ACLU, was for the Eleventh, anchored in Atlanta, to find a way to get to *Savannah*. (J.S. App. 15-20) Georgia's Attorney General complained, to no avail, that the proposed configuration of the Eleventh District being advocated by the DOJ/ACLU as violative ". . . of all reasonable standards of compactness and contiguity." (J.S. App. 19) The DOJ was unmoved. Traditional districting principles were then subordinated on a wholesale basis to further the black maximization policies of the DOJ/ACLU by drawing boundaries that specifically included Blacks and excluded whites. Ms. Wilde, the ACLU attorney and acknowledged architect of the gerrymandered District in issue, was not apologetic: "That is how you draw a majority black district." (J.S. App. 20).

(6) The State, acting through its Director of the State Reapportionment office, drew the Eleventh "as close as she could to copying the Max-Black percentages. She was prevented from exact duplication by the need to construct eight other districts . . . ." (J.S. App. 22).[1]

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[1] The DOJ/ACLU team did not even bother with requiring the Max-Black plan to be presented as a state-wide plan. The ACLU

(7) The twin forces that led to the racial gerrymander in issue were the ACLU's advocacy of a black vote maximization policy and the DOJ's misguided reading of the VRA as obligating states to maximize black voting strength wherever possible without regard to the resulting aberrations in the shape and size of the district and the fact states were forced to segregate voters on the basis of their race. This *de facto* delegation of authority by the DOJ to the ACLU was found by the District Court to be an "embarassment." (J.S.App. 26-27).

The dissenting judge adopted a "shape over substance" approach to *Shaw*. In so doing, the dissent would turn a deaf ear and blind eye to the machinations of the ACLU and the DOJ's abuse of its authority under the VRA. The dissent believed the existence of a racial gerrymander turned on the subjective opinion of the fact-finder as to the geometric shape of the District, independent of where the people are concentrated and whether they were intentionally racially segregated by this district's boundaries. With all due respect, the courts cannot hope to offer the kind of continuity we expect of our jurisprudence if the standard is, essentially, a visceral one that will vary from judge to judge and be materially impacted by subjective perceptions that, in the end, are highly personal spatial observations unrelated to any objective standard.

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just drew the Max-Black districts and left the State to work out the rest as best it could.

ARGUMENT

I. THE DISTRICT COURT'S CONCLUSION THAT RACIAL GERRYMANDERING RESULTED IN A BIZARRELY CONFIGURED DISTRICT IS REVIEWED UNDER THE CLEARLY ERRONEOUS STANDARD

This Court has made clear that findings of fact are reviewed under the clearly erroneous standard. This is a strict and longstanding rule. It has been expanded to include ultimate findings in Voting Rights Act cases. *See Thornburg v. Gingles*, 106 S. Ct. 478 U.S. 30, 92 L.Ed.2d 25 (1986).

The standard is especially applicable in these types of cases because of the importance of local factors and geography in assessing whether a gerrymander has infected a districting plan. By analogy, this Court has repeatedly held that the ultimate question of vote dilution under the VRA is a finding subject to review under the clearly erroneous standard:

> ". . . [O]ur several precedents . . . have treated the ultimate finding of vote dilution as a question of fact subject to the clearly erroneous standard of Rule 52(a)." *See, e.g., Rogers v. Lodge*, 458 U.S. at 622-627; *City of Rome v. United States*, 446 U.S. 156, 183, 100 S.Ct. 1548, 1564 . . . (1980); *White v. Regester*, 412 U.S., at 765, 770, 93 S.Ct. at 2339, 2341." *Thornburg v. Gingles*, 106 S.Ct. at 2780.

This same reasoning must apply to the presence of a racial gerrymander because the rationale for the deference —the importance of local factors—is equally applicable in both types of cases. As the Court stated in *White v. Regester*, 412 U.S. at 769-770, 93 S. Ct. at 2341:

> "[W]e are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise."

The *Gingles* court concluded:

> "Thus, the application of the clearly erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law."

106 S. Ct. at 2752.

A case of minority vote maximization via racial gerrymandering should be decided under the same standard as a vote dilution case. District courts possess the critical knowledge and experience of the local jurisdiction in issue to make the critical factual determinations on which these cases must turn.

A finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 84 L.Ed.2d 518 (1985), (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 68 S. Ct. 524, 92 L.Ed.2d 746 (1948). Furthermore, the Court has emphasized that " '[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' " *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 573, 105 S. Ct. 1511 (1985), (*quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L.Ed.2d 129 (1969)).

The District Court brought its considerable local knowledge to bear in this case; that is readily evidenced by its exhaustive opinion. That knowledge is an indispensable ingredient to any sound judgment as to whether this district so materially departed from Georgia's traditional and historical districting principles for racial reasons that it must stand the test of strict scrutiny.

II. THE DISTRICT COURT PROPERLY HELD, IN ACCORDANCE WITH *SHAW v. RENO*, THAT GEORGIA'S LEGISLATION CREATING THE ELEVENTH CONGRESSIONAL DISTRICT VIOLATED THE PLAINTIFFS' RIGHT TO EQUAL PROTECTION

Perhaps it is the simplicity of *Shaw's* teaching that creates the problem for Appellants. The District Court's summary of *Shaw* leaves little to quarrel about as to the standard by which racially gerrymandered districts are to be judged:

> "*Shaw* holds that if a plaintiff shows that racial concerns were the overriding consideration for drafting a redistricting plan, leading to the creation of dramatically irregular district boundaries, that plan is unconstitutional, unless it survives constitutional strict scrutiny." *See Shaw*, 113 S.Ct. at 2826-27.

Contrary to Appellants' view, *Shaw* makes clear that a "highly irregular" boundary line is not the only evidence that would be probative of the existence of a racial gerrymander:

> "The difficulty of proof, of course, does not mean that a racial gerrymander, once established should receive less scrutiny under the Equal Protection clause than other state legislation classifying citizens by race. Moreover, it seems clear . . . that proof sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so *highly irregular* that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race. [cit.] *Gomillion* [*v. Lightfoot*], 364 U.S. 339, 81 S.Ct. 127 . . . *so, too, would be a case in which a state concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity and respect for political subdivisions.*" (Emphasis added). 113 S.Ct. at 2826.

No one can dispute the fact that the above-emphasized portion from *Shaw* fits the Eleventh District like a glove. While Georgia has persistently contended the gerrymander that formed the framework for this district was fashioned by the ACLU and forced upon it by the DOJ, those facts hardly absolve the State from ultimate responsibility.

Appellees agree that the Eleventh District does not represent a voluntary act of the Georgia legislature. The District Court made voluminous findings in that regard. No party disputes those facts. Appellees acknowledge the State argued mightily against legislatively animating the gerrymandered version of the "Max-Black" plan that is now the Eleventh District, because of its blatant violation of Georgia's traditional districting principles. (J.S. App. 19). The Georgia Attorney General made this written statement to the DOJ before finally acquiescing to their demands:

> ". . . [T]he extension of the 2nd District into Bibb County and the corresponding extension of the 11th District into Chatham County (Savannah), with all the necessary attendant changes, *violate all reasonable standards of compactness and contiguity.*" J.S. App. 19, emphasis added).[2]

Given that statement, it is not surprising the State's proof as to its adherence to traditional districitng principles was virtually nonexistent. It would be an under statement to say that the State's expert witness on compactness, Lisa Handley, was not well received by the Court. In large measure, this was due to the fact the only way the State could generate any argument at all on compactness was to *invent* a compactness test just for this district.[3] The District Court was not fooled:

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[2] It is difficult to understand how the Attorney General could now argue to this Court that the district is compact.

[3] The District Court found that the ". . . test, formulated . . . specifically for this litigation, constituted the State's only notable submission on the subject of compactness." (J.S. App. 78)

> "[T]he . . . test is especially *useless* in analyzing the Eleventh District while the vast—and sparsely populated—core of the Eleventh accounts for the district's favorable score on Dr. Handley's test, the narrow—and densely populated—appendages escape notice. *In fact, this test is an excellent means of highlighting the egregiously manipulated portions of any voting districts.* . . . (J.S.App. 79, emphasis added).

On the issue of compactness, the District Court found:

> "[T]he . . . Eleventh District, from a population based perspective . . ., is not compact for purposes of Section 2 of the VRA. The population of the Eleventh are centered around four discrete widely spread urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors . . . . These communities are so far apart that the DOJ's insistence . . . they are "compact" renders the term meaningless. The hooks, tails and protrusions of those counties reveal the true "shape" of the district. . . ." (J.S. App. 78-79)[4]

Neither the State nor the Intervenors offered any other witnesses on the question of the district's shape. At trial, Plaintiffs offered the population density map attached as Appendix 1 to underscore the truth about this district. It is nothing more than four distant population centers, gerrymandered to make them majority black, stuck together by over 6000 square miles of farmland. Maps reevaling the gerrymander of DeKalb, Chatham, Richmond and Effingham counties are also included in the Appendix so the Court can get a feel for just how cleanly a computer can separate the races. (App. 2-5)[5]

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[4] The District Court also found there was considerable potential for voter confusion due to the fact the ". . . erratic lines and split counties and precincts do not afford voters ready indications of the district in which they reside." (J.S. App. 80, fn. 43)

[5] These are known as race maps, the most common tool used by the DOJ/ACLU to fashion the Eleventh. The orange represents an

The State freely admitted race drove the district's creation and that the ACLU's Max-Black plan was the DOJ's litmus test for the district's racial population percentages. Given those admissions, the district had no hope of surviving strict scrutiny. So, the State opted for an "all or nothing" defense by arguing first, that the admitted racial gerrymandering was accomplished without having to draw boundaries that were as bizarre as what was done in other Southern states. Second, the State contended the district was not bizarre because its boundaries track bits and pieces of state, county, city, precinct and highway lines. These arguments, if accepted, would allow wholesale racial gerrymandering to escape constitutional review.

The District Court made short work of these arguments. It recognized that the way racial gerrymandering is accomplished at the Congressional level is to contort distant densely populated urban areas into super majority black population centers and then connect them. The urban cities/counties divided for racial purposes must, by definition, be located on the peripheries of the gerrymandered district. (J.S. App. 22) This is the only way to segregate a political subdivision's population racially. Thus, myriad chards of the circumferences of these divided cities and counties always become conterminous with district boundaries. This is the very evidence from which gerrymandering is proven.

The State, however, tried to turn this geographical truism to their advantage. In its view, bits and pieces of divided city, county lines that blend with the districts boundaries because of the gerrymandering taking place could be considered evidence of *regularity*. Incredibly, the tables the State hinges its case on are intended to quantify just such a contention. (Tables 1-2, *Miller*, J.S., p. 7-8).

Absurd results would follow if the consequences of racial gerrymandering were accepted as indicia of regu-

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area that is over 50% Black; yellow is over 60% Black, and blue is 35-49% Black. Grey is less than 35% Black. See Plaintiff's trial exhibits 11; 18-20.

larity. Just two examples should suffice. The State contends adherence here and there to State boundaries is evidence of a district's regularity regardless of the location of the population centers. A review of the unconstitutional Fourth District in Louisiana points out the fallacy of such a contention. Almost half its boundary is coterminous with the State's northern boundary. *See Miller's* J.S., App. 109. The district itself, however, hangs from that border like long icicles off a roof, fingers that grope for and grab pockets of Blacks, but thin out and elongate to skirt contiguous population centers that are predominantly white. The State would argue that the Court should not even inquire as to the reasons for the formation of the "icicles", given the regularity of the roof line.

For a second example, consider the thin land bridge that runs through Effingham and Chatham County to reach the black neighborhoods of Savannah. (App. 3-4) Its purpose was to get Black people in Savannah into the Eleventh while maintaining technical contiguity with the rest of the district. This land bridge has, as its eastern border, the state line of Georgia and its coast. It has such a boundary, not because of any desire to follow a state line, but to avoid the predominantly white population in Effingham County by running the district to Savannah partially through a swamp. (J.S. App. 42-43) Should this racial motive be immune from strict scrutiny merely *because* a state line that runs through a swamp came into play?[6] If ever an argument could be said to put form over substance, the Appellants have done it.

The District Court correctly refused to ignore the *reason* for the unprecedented division of cities and coun-

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[6] Likewise, pieces of the boundaries of DeKalb, Richmond, Chatham, Wilkes and Baldwin counties that matched the ultimate boundaries of the Eleventh are touted by the State as proof of the district's regularity while, in the same sentence, it freely admits these counties were torn apart solely to further the segregationist motives of the district architects.

ties required to create the DOJ mandated majority minority districts.[7] The majority firmly grasped the fact that the mechanistic interpretation of *Shaw* urged by the State would create a gaping loophole in the fabric of our Constitution through which all fashions of admitted racial gerrymanders would escape strict scrutiny. It did not permit this attempted end run around the Equal Protection Clause.

III. GEORGIA'S UNPRECEDENTED AND EXTREME DEPARTURE FROM ITS TRADITIONAL DISTRICTING PRINCIPLES FOR PURELY RACIAL REASONS IS SUBJECT TO STRICT SCRUTINY

There is nothing new about this Court's view that the Fourteenth Amendment requires strict scrutiny of legislation that incorporates racial classifications. The State's "shape only" argument is borne of the fact it cannot allow an analysis under the strict scrutiny test due to its acknowledgement that the District is based on a "black max" plan—the converse of the "narrow tailoring" required for the use of racial classifications in legislation. The District Court made short work of the State's contention that shape, and shape alone, must be the evidence from which a finding of gerrymandering is based:

> "Defendants argued . . . that evidence of the legislature's intent to gerrymander must be inferred from the shape of the . . . District itself, and not from direct testimony of those involved in the process. This view finds little support in *Shaw v. Reno*. The purpose of scrutinizing a district's shape is to glean the intent of the legislature by working backwards. If the district appears uninfluenced by accepted districting principles . . . it must have been influenced

[7] The District Court also rejected the State's contention that adherence in some spots (the gerrymandered areas) to precinct lines was evidence of regularity. The State's own Director of Reapportionment Services testified that the use of such lines as racially motivated. (J.S. App. 46)

> by unaccepted ones. The Supreme Court explicitly approved this inferential approach because legislative intent is notoriously difficult—if not logically impossible—to ascertain . . . . *What the Supreme Court did not do in imbue geography with constitutional significance*; the requirement for a successful Equal Protection claim is still *intent*, however proved. Foreclosing production of direct evidence of intent until Plaintiffs convince the Court that a district looks so weird that race must have dominated its creation is not what *Shaw* intended. [Defendants'] approach would make district shape a (previously unheard of) threshold to constitutional claims." (J.S. App. 42, emphasis added).

In taking up the State's banner, the dissent has chosen a path no subsequent court could hope to follow. There can be no universal standard by which shape, and shape alone, can govern the ability of citizens to seek relief from the disenfranchising and discriminatory effects of a racial gerrymander. Each case is unique to the locale where it arose. No one would ever suggest for a minute that *Black* voters would be so limited that motive and intent could be ignored in determining whether a gerrymander existed. That is racism in its purest form and has no place in the *equal protection* jurisprudence of this Court.

Of all the three judge courts that have dealt with issue of racial gerrymandering and construed the standards established in *Shaw v. Reno* for constitutional review of an alleged gerrymander, no court has agreed with the State's position. Even in *Shaw v. Hunt*, where the District Court rejected the Plaintiffs' claims in a 2-1 decision, the majority refused to adopt such an extremely narrow view of *Shaw*. Once that contention is rejected, the State has no further defenses to offer.

Lest we lose right of it in the smoke and fire of the racial politics that drove the creation of this district, it is important to remember that the primary purposes of reapportionment is to equalize the voting districts' popula-

tion so to comply with the constitutional mandate of one man-one vote. Each state has its own districting traditions, its own history of reapportionment. When those districting traditions are ignored, when districts are drawn that twist and turn due solely to the need to meet racial percentages, the district must stand the test of scrutiny. That is the only way to insure white voters are not either being discriminated against, or, if they are, to insure the State is furthering a compelling state interest in a manner narrowly tailored to further that interest.

IV. COMPLIANCE WITH THE VOTING RIGHTS ACT CAN NOT CONSTITUTE A COMPELLING GOVERNMENTAL INTEREST IN THIS CASE SINCE THE STATE AFFIRMATIVELY DISAVOWED THE VOTING RIGHTS ACT AS ITS RATIONALE FOR THE REDISTRICTING LEGISLATION

Unlike the other Southern states defending DOJ mandated gerrymanders, Georgia did not (because it could not) argue compliance with the Voting Rights Act as a compelling state interest to justify this district. It was wise not to. No court would ever hold the failure to combine the distant urban centers, skeletonized of their white citizenry by the computer driven gerrymandering techniques of the ACLU, would violate Section 2 of the VRA. The DOJ could never have met the test for vote dilution laid down by this Court in *Gingles, supra.* The District Court so found. (J.S. App. 78-80)

It is not surprising then that the DOJ urged this Court to great plenary review in the Louisiana case [8] and hold the case at bar. In its jurisdictional statement, the DOJ carefully skirted the huge problem created by Georgia's recognition that compliance with the Voting Rights Act cannot serve as a compelling state interest to justify the race based districting that took form as the Eleventh Dis-

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[8] *United States v. Hayes,* Docket No. 94-558.

trict. Note the language the DOJ chose to describe the dilemma:

> "The first question in both [*Hayes* and this case] would be whether the State's asserted interests in drawing an additional majority minority district were sufficiently compelling . . . . In both cases, the primary interests that *could be asserted* were the need to comply with Section 2 and . . . Section 5 of the Voting Rights Act . . . (p. 16, emphasis added).

The key words are *"could be asserted."* In this case, it was not so asserted.

Georgia has gone to great lengths to disavow any correlation between the State's acquiescence on the preclearance demands of the DOJ and any perception on the part of Georgia that the failure to draw such a gerrymandered district would violate either Section 2 or 5 of the Voting Rights Act. Georgia had this to say about its preclearance experience and what the DOJ believed the Act required of a state:

> ". . . [I]n [the DOJ's] view . . . *anything* can be done in the name of minority voting opportunities. . . . [I]n the intervenors' view . . . 'race trumps all else'." (*Miller*, J.S., p. 15).

A. A Congressional District Which Is Bizarrely Configured And Is Overly Safe From The Vantage Point Of Assuring The Election Of A Black Representative, Is Not Narrowly Tailored To Further A Compelling Governmental Interest

Georgia affirmatively opposed the DOJ's contention that the district's gerrymandered boundaries were compelled by the VRA to remedy racially polarized voting. And Georgia also demonstrated, via expert testimony, that even assuming a compelling state interest existed in the VRA, the district was far from being narrowly tailored. Georgia stood firmly with the plaintiffs on that issue at

trial and the District Court agreed. (J.S. App. at pp. 86-87.)[9] Based on testimony offered by the State's expert witness, the Court found that Black candidates would have ". . . an equal chance of being elected in a district containing 45-50% black registered voters." (J.S. App. p. 88) The Eleventh District is overly safe with 57% Black registered voters which gives the Black candidate a 73% probability of winning. Obviously, an assessment using the district's Black voting age population (61%), the standard used by this Court in *Johnson v. DeGrandy*, 114 S. Ct. 2752 (1994), ". . . would yield an even higher probability." J.S. App. 88).

The District Court therefore had little problem finding that, even assuming the VRA provided a compelling state interest to engage in remedial districting, the district was not narrowly tailored. Georgia thus found itself vindicated on the one hand, but devoid of any constitutional basis upon which to justify the race based districting that resulted from Georgia's acquiescence to the DOJ/ACLU ultimatum to "maximize" Black voting strength, regardless of the bizarre shape of the resulting district, or be denied clearance under the VRA.

The consequences of the DOJ's Section 5 review of the Georgia Congressional plan, if left to stand, would have cataclysmic effects on the democratic form of government we are guaranteed by our Constitution. In the Eleventh District, regional representation has been supplanted by racial representation. To tinker with such a fundamental aspect of our democracy would be unthinkable but for the fact its proponents advance their claim under the banner of "equal opportunity". The road to a color blind society is surely not followed by method-

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[9] The District Court correctly observed that ". . . the State . . . retained Dr. Katz for the unusual purpose of undermining the testimony of both Intervenor United States' expert . . . and Plaintiffs' expert. He was largely successful." (J.S. App. 86)

ical segregation of the races into separate voting districts. The Constitution must remain unsullied in its pristine guarantee of equal protection if we are not to regress into a country of racial and ethnic enclaves. This Court has made this point time and time again. *See e.g., Wright v. Rockefeller,* 376 U.S. 52, 53-58, 84 S. Ct. 603 (1964). The District Court correctly implemented that message in this case. (J.S. App. 32, n.17)

V. GEORGIA CANNOT HAVE A COMPELLING GOVERNMENTAL INTEREST IN PROPORTIONAL REPRESENTATION OF MINORITIES

This case was foreshadowed in Justice Kennedy's concurring opinion last term in *Johnson v. DeGrandy,* 114 S. Ct. 2647, 2666 (1994).

> "Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid Section 2 litigation. . . . The Department of Justice might require (in effect) the same as a condition to granting preclearance under Section 5 of the Act. . . . *Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause its set against.* [cit.] As a general matter, the sorting of persons with any interest to divide by reason of race presents the most serious constitutional questions." Opinion at pp. 20-22.

Justice Kennedy's fears became reality in Georgia.

After the *DeGrandy* decision was handed down, the State announced that its alleged interest in "proportionality" would, standing alone, satisfy the troublesome need for a compelling state interest. (J.S. App. 51) This novel contention, borne of a most tortured reading of the Court's *DeGrandy* opinion, was juxtaposed against the

explicit disavowel in the VRA of any requirement of proportional representation and summarily dismissed by the District Court. (J.S. App. 53-54)

The State argues that the end (rough proportionality) somehow justifies the means (segregation via gerrymander). The District Court characterized the State's argument as tautological, holding proportionality standing alone, can never be a compelling state interest. (J.S. App. 53) To require proportionality is to sanction racial quotas. The constitution forbids it, and the Voting Rights Act specifically disavows it. To accept the State's claim that proportionality, in these circumstances, does not function as a racial quota, would require this Court to ignore the overwhelming and largely undisputed evidence to the contrary detailed in the District Court's opinion regarding the origins of the Georgia plan. To evaluate proportionality to such a level would require reversal of a long line of precedent that prohibits employment of racial quotas by governments, from admissions policies for professional schools, to public sector affirmative action plans and the awarding of public contracts. *See e.g., City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

The evidence was overwhelming on the issue. The Eleventh District's boundaries were drawn specifically to maximize the number of minority controlled districts and to meet "Black-Max" racial population quotas. Not even Appellants contend that the district's bizarre shape was an incidental and natural development during reapportionment. The number of majority minority districts in the plan suddenly became proportionate to the percentage of black people living in the State only because the DOJ decreed it be so over the State's strident objection. The State's eleventh hour attempt to reply on proportionality

is an attempted revision borne out of advocacy rather than history.

If there were sufficiently large, concentrated and compact minority populations capable of supporting the creation of three minority controlled districts, Section 2 of the VRA would have provided the mandate for their creation. See *Gingles, supra.* That was not the case here, the District Court finding ". . . the district does not satisfy the *Gingles* preconditions . . .". J.S. App. 88) Were it otherwise, there would be no need for any discussion of proportionality in the context of what compelling state interest could justify the race based districting under challenge. The State correctly conceded it did not possess the kinds of contiguous and concentrated minority populations sufficient to justify, or even mandate, the creation of three minority districts under the *Gingles* standard. With this concession, the VRA falls away as substantiation for the blatant dominance of race as the creative force behind the Eleventh District.

The State acknowledged there is no legal obligation or authority under the VRA to excise the black people out of DeKalb County and link them by various land bridges to distant black populations excised out of coastal Savannah. In fact, the State stipulated Savannah would *not* have been included in the District *but for* the need to increase the Black population of the District. (J.S. App. 48-49)[10] The ideal of proportionality can never justify a State's creation of voting districts based on race with quota like black population percentages imposed by the DOJ/ACLU. This Court must leave this social debate without arming proponents of proportionality with con-

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[10] Incredibly, the line drawing in Chatham County (Savannah) excised a 80,000 plus population for inclusion in the Eleventh that was 84% Black from a general population that was 62% white. See Race Map of Chatham County at App. 2.

stitutional authority to gerrymander. Given the standard of review applicable to this case, this Court must accept the District Court's findings on this issue and affirm the decision below.

VI. THE ABRAMS INTERVENORS SHOULD NOT BE PERMITTED TO PARTICIPATE IN ANY PLENARY REVIEW OF THIS CASE

From the onset, this litigation has been slowed and unduly complicated by the presence of the Intervenors.[11] That sentiment is borne out by a review of the ACLU's jurisdictional statement. Their contentions at trial and on appeal are wholly duplicative of the DOJs position. The ACLU intervenors present no credible arguments or contentions not adequately advanced either by Georgia or the Justice Department.[12] Should this Court not summarily affirm the judgment below, they are not a necessary party to any plenary review of this case. For this reason, the six (6) issues they urge the Court to consider are dealt with summarily below:

1. *Plaintiff's lack of standing*: The three judge Court characterized the lack of standing argument as *frivolous*. (Order of June 14, 1994). *Shaw* specifically states that nothing in the law precludes "white voters (or voters of any race) from bringing a . . . claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." 113 S. Ct. at 2824, 2830. No Court has

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[11] During the trial of this case, the Court expressed constant displeasure over the role Intervenors sought to play in the presentation of the evidence. The Court's frustration reached the point where Judge Edenfield observed that, in retrospect, granting the Intervenors party status was a mistake.

[12] All DOJ/ACLU evidence at trial was presented jointly. The ACLU offered no independent expert testimony.

since questioned *Shaw*'s holding that voters having standing to challenge racially gerrymandered districts. The argument is not worthy of further discussion; perhaps that is why the ACLU Intervenors only offered two sentences on the subject.

2. *The District is not bizarre*: The Court below found the district's boundaries to be bizarre as that term is defined in *Shaw*. The standard of review of such fact finding makes it unworthy of plenary review. The ACLU intervenors offered *no* independent evidence as to the appearance of the district. Instead, they focused their presentation on the proposition, which no court has accepted to date, that being Black, in and of itself, creates a racial community of interest that transcends geography and legitimizes majority minority districts, no matter how bizarre their shape. Again, the argument is not a serious one given the Court's holding in *Shaw*.

3. *Racial Community of Interest As Compelling State Interest*: As noted above, the question is not substantial. The racial community of interest argument advanced by these intervenors would effectively overrule *Shaw*. The consolidation of Black voters into their own districts so to maximize their voting strength, regardless of the geographic aberrations required to bring together a "racial" community of interest, is the political apartheid *Shaw* speaks so eloquently against. In the search for an integrated color blind society, the ACLU intervenors advocate resurrection of racial enclaves that, at least politically,, will resegregate society. That is precisely what *Shaw* was intended to prevent.

4-5. *Voting Rights as a Compelling State Interest*: Throughout the case, the State has refused to raise the VRA as a compelling state interest to justify the bizarre geography of the Eleventh District. The State put on expert testimony, accepted by the Court, rebutting Intervenors' joint efforts to paint Georgia as suffering from rampant racially polarized voting that mandated con-

struction of a remedial district. Intervenors' frustration with the State's rejection of this defense has found a voice in their decision to vicariously advance compliance with the VRA as the State's motive for the district's configuration. The missing link in the logic is, of course, the State's refusal to participate in the plan and the incurable antagonism between the maximization goals that the district was based on and the narrow tailoring required under strict scrutiny. The Intervenors are left with the State's *post hoc* rationalization, borne of its misreading of the *DeGrandy* decision, that proportionality was its "true motive". However, this is not simply a compelling state interest sufficient to withstand strict scrutiny under the Equal Protection Clause. With that recognition, the equal protection analysis is at an end.

6. *Narrow Tailoring*: The issue is mooted from the State's vantage point due: (1) to the absence of a compelling state interest; and (2) the expert testimony it offered to rebut the Intervenors' claim that the 65% Black population was needed to give minority candidates an equal opportunity. Intervenors are hard pressed to contend with any credibility that a plan known as the "Black Max" is "narrowly tailored". The District Court meticulously traced the interrelationship between the advocacy of the ACLU, the positions taken by the DOJ during the preclearance process of the fact the ACLU's Black-Max plan became the blueprint for what is, for now, the Eleventh District. Maximization is the antithesis of narrow tailoring. The ACLU is "hoisted on its own pitard" with respect to this aspect of the strict scrutiny test.

CONCLUSION

This case presents a scenario that is an anathema to a constitutional democracy. The will of the people, as expressed by their elected representatives, was subverted in ruthless fashion. And this subversion was accomplished by no less a force than the United States Department of Justice, whose conduct the District Court characterized as nothing less than an "embarrassment." (J.S. App. 27)

Democracy is a system of government that depends on an intricate scheme of checks and balances for its viability. The genius of our democracy is that there is a check to correct every wrong—even when it is visited upon the people by the federal agency charged with enforcement of our constitution and laws. The trial court performed that function thoroughly and courageously.

This Court has repeatedly acknowledged the extreme deference due local tribunals in matters of this nature. It should not stray from that precedent, particularly where it is not presented with a single issue of first impression by this case due, in large measure, to the State's admissions and its refusal to rely upon the Voting Rights Act as justification for the gerrymander. Instead, Georgia has offered the weak pop fly of proportionality as its reason for deployment of a racial gerrymander. That is not an argument worthy of serious consideration.

Racial gerrymanders that torture our most fundamental right—to vote in elections free of governmental intervention on the side of any candidate or any class of candidates—are generally not welcome in a democracy. Given the well supported and largely stipulated findings upon which the District Court decision is based, coupled with the deference they are due, summary affirmance is warranted.

Respectfully submitted,

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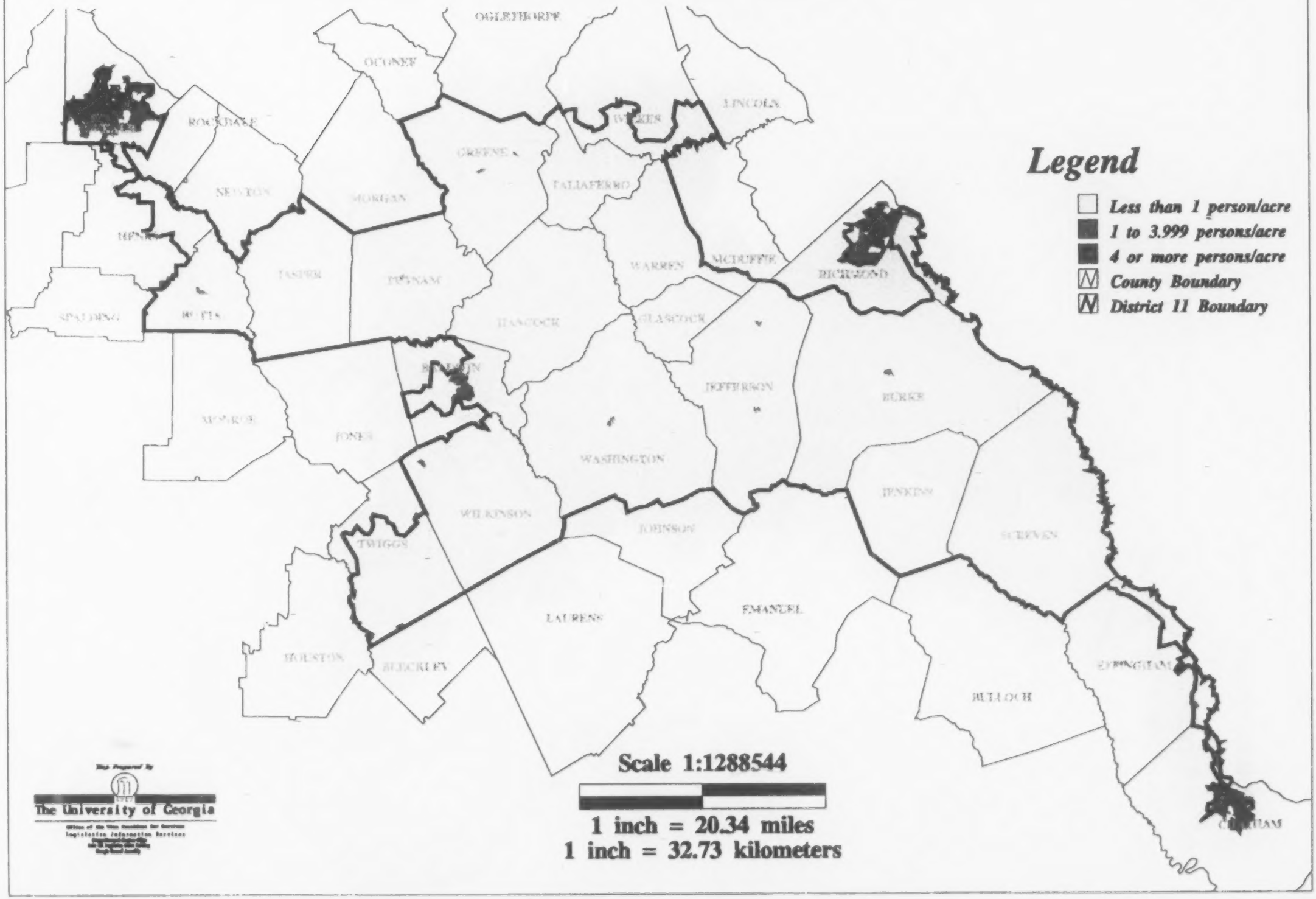
December, 1994

Persons per Acre by Census Block Group



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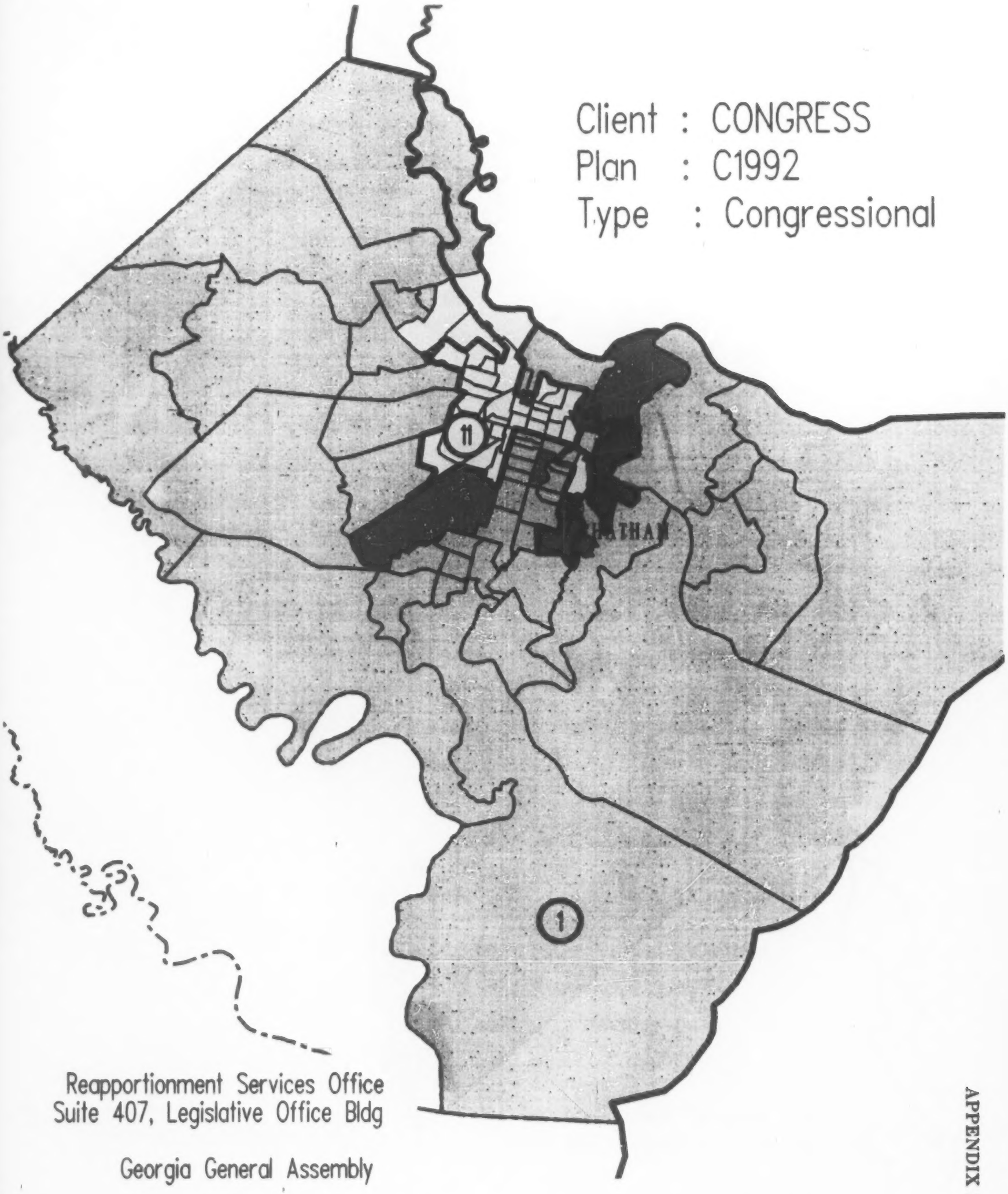

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Georgia General Assembly

APPENDIX 2

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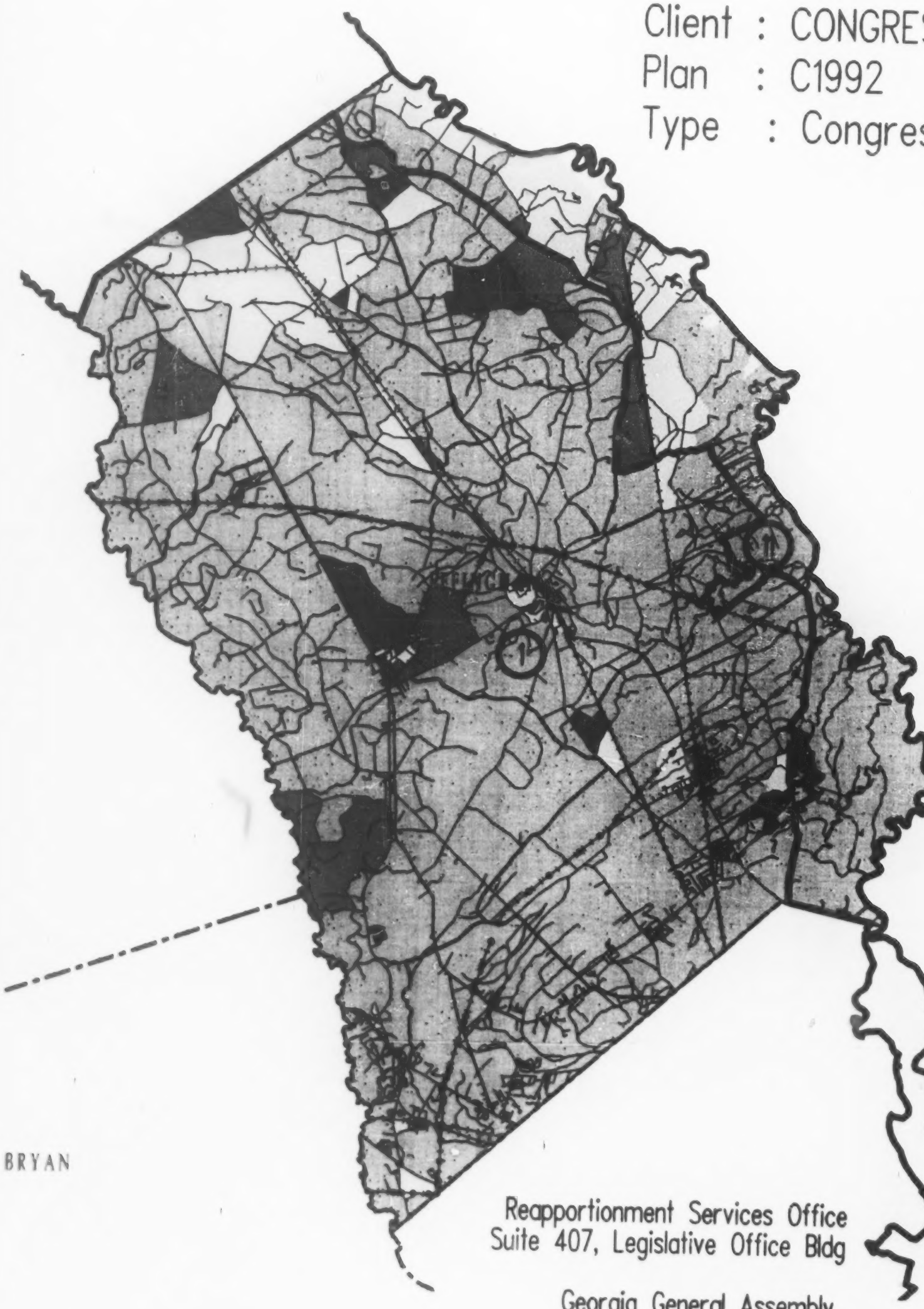
Type : Congressional



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APPENDIX 3

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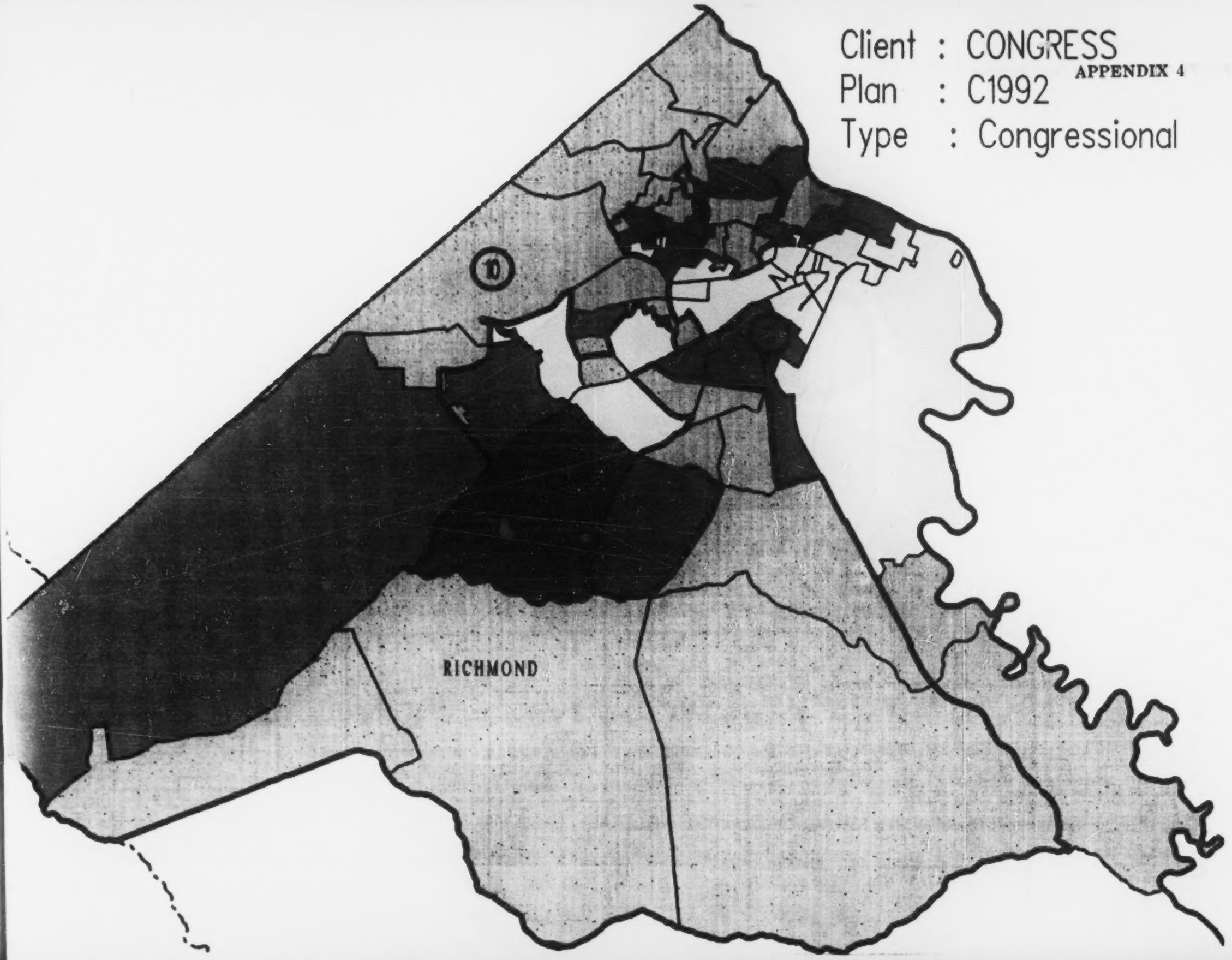

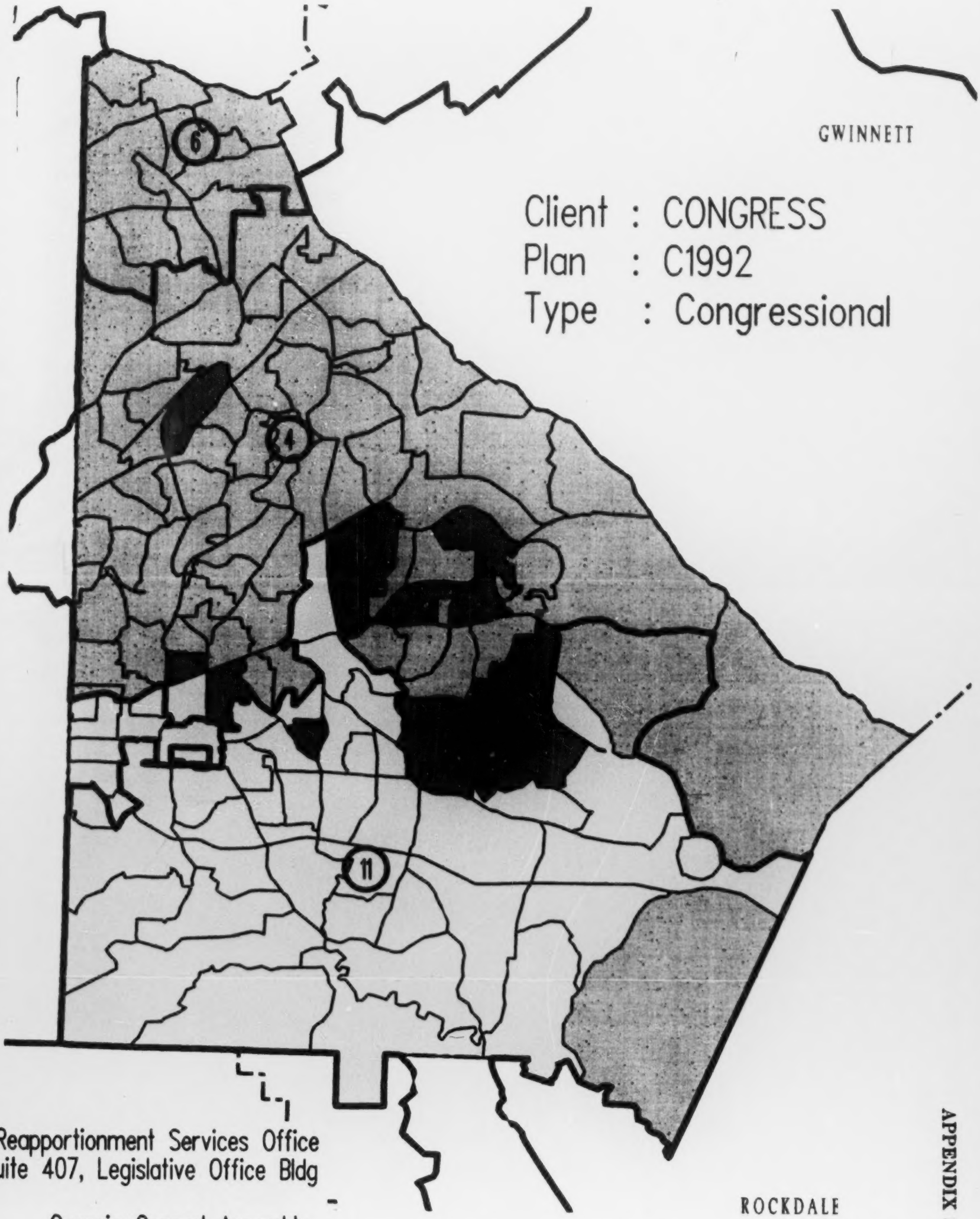

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APPENDIX 5